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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1421~~ 190

MICHAEL J. VAIARELLA,
PETITIONER,

v.

JAMES F. SHANAHAN CORPORATION,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MASSACHUSETTS, ESSEX COUNTY

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MASSACHUSETTS, ESSEX COUNTY

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Michael J. Vaiarella, respectfully prays that a writ of certiorari issue to the Superior Court of Massachusetts, Essex County, to review the judgment of that court entered on March 27, 1967, in accordance with a rescript entered by the Supreme Judicial Court of Massachusetts on March 13, 1967, in which the said court ordered petitioner's exceptions overruled. The judgment of the court below is entered on its docket and is contained in the official

record of the court below (R., Docket Entries, 27). The said docket entry is hereto appended and marked Appendix A. The rescript of the Supreme Judicial Court of Massachusetts is contained in the official record of the court below (R., Rescript) and is hereto appended and marked Appendix B.

I.
Opinion Below

The opinion of the Supreme Judicial Court of Massachusetts does not appear, as yet, in the official reports. It is contained in the official record of the court below (R., Decision) and is hereto appended and marked Appendix C. It may be found in 224 N.E. 2d 454 and in 1967 Mass. Adv. Sh. 495.

II.
Jurisdiction

The judgment of the Superior Court of Massachusetts, Essex County, sought to be reviewed is dated March 27, 1967 and was rendered in accordance with a rescript of the Supreme Judicial Court of Massachusetts entered March 13, 1967, overruling the petitioner's exceptions. No rehearing of the decision of the Supreme Judicial Court of Massachusetts was sought.

The jurisdiction of this court to review by a writ of certiorari the judgment complained of is conferred by 28 U.S.C.A. 1257, and the time allowed for review is conferred by 28 U.S.C.A. 2101 (c).

III.
Question Presented

In an action by a seaman to recover damages for personal injuries sustained as a result of unseaworthiness

and/or negligence, whether, under 45 U.S.C.A. 54, as a matter of law, a seaman is entitled to an instruction that assumption of the risk is not a defense when the issue has been raised during the trial.

IV.
Reasons Relied Upon for the Allowance of the Writ

There is substantial conflict in the Courts of Appeals with the Third Circuit and the Sixth Circuit being opposed by the holdings of the Second Circuit and the Fifth Circuit.

There is also substantial conflict with the decisions of the Court of Appeals and that of the highest court of the state with the Third Circuit and Sixth Circuit being opposed by the holdings of the highest Court of the Commonwealth of Massachusetts, Illinois, Missouri and California.

The decision of the court below would effect a substantial change in the basic and traditional admiralty and maritime law, as it restricts the benefits afforded seamen and is in direct conflict with many decisions of this Honorable Court, including *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54 (1943), *Urie* v. *Thompson*, 337 U.S. 163 (1949), *Blair* v. *Baltimore & Ohio R.R.*, 323 U.S. 600 (1945) and *Schlemmer* v. *Buffalo, Rochester & Pittsburg R. Co.*, 205 U.S. 1 (1906).

V.
Statutes Involved

The pertinent statutes involved are the Federal Employers' Liability Act, 45 U.S.C.A. 54, and the Merchant Marine Act of 1920, commonly known as the Jones Act, 46 U.S.C.A. 688. The pertinent portions of these statutes are hereto appended and marked Appendices D and E.

VI.
Statement of the Case

This is a case involving the rights of a seaman who was injured as a result of the negligence of the respondent, its agents, servants or employees and/or the unseaworthiness of the respondent's vessel where the defense of assumption of the risk is raised during the trial.

The petitioner's declaration was in three counts, the first count based on negligence under the Jones Act, 46 U.S.C.A. 688, the second count based on unseaworthiness under the General Admiralty or Maritime Law, and the third count being for maintenance and cure (R., 22, 23 and 24). The case was entered in the Superior Court of Massachusetts, Essex County, and was remanded to the District Court. (R., Docket Entries, 1, 2, and 10). The matter was first tried in the District Court and a finding was made for the respondent on Counts I and II, and for the petitioner on Count III. The case was retransferred to the Superior Court of Massachusetts, Essex County and tried to a jury. (R., Docket Entries, 11-13).

At the trial, the petitioner requested the trial judge to charge that assumption of the risk is no defense to the negligence of the respondent or the unseaworthiness of the respondent's vessel. (R., 4, 5). The trial judge refused and the petitioner duly excepted (R., 20). The jury returned a verdict for the respondent on Counts I and II and a finding was entered for the petitioner on Count III. (R., Docket Entries, 15-17).

The petitioner, being aggrieved by the trial court's failure to properly instruct the jury concerning the defense of assumption of the risk, timely filed his bill of exceptions, which was duly allowed, as amended. (R., 21).

The Supreme Judicial Court of Massachusetts in overruling the petitioner's exceptions said: "See *Clark* v.

Pennsylvania R.R., 328 F.2d 591-596, (2d Cir.), distinguishing *DeLima* v. *Trinidad Corp.*, 302 F.2d 585, 587 (2d Cir.). In the latter case, the court in the special circumstances had said that reference to assumption of the risk would have been proper. Compare *Koshorek* v. *Pennsylvania R.R.*, 318 F.2d 364, 366-370. See the dissenting opinion (pp. 371-375.)." (R., Decision 5-6, Brief 20)

VII.
Statement of the Facts

The evidence was that on April 28, 1963, the petitioner was employed by the respondent as a cook and deckhand aboard the fishing vessel MARIS STELLA, which was owned, operated and controlled by the respondent (R., 2). At approximately 8:00 P.M. the vessel was on the high seas and engaged in commercial fishing. (R., 2). The petitioner had just finished standing watch and as he proceeded down the ladder leading into the forecastle (seamen's quarters in the forward part of the vessel) he slipped and fell backwards and injured his arms, wrist and hands. (R., 2).

The facts revealed that at the time of the petitioner's accident the top step of the ladder from which the petitioner fell was old, worn and smooth; that this condition had existed for at least two months prior to the accident and that the petitioner had told the captain about it; that at the time of the accident the lighting was inadequate; that there were no handholds leading from the doghouse (entrance on deck) going below although it was customary and usual to provide handholds for the safety of the crew (R., 2).

On cross examination the petitioner stated that although he knew that the ladder was defective and that the companionway was not lighted he proceeded down the ladder. (R., 3).

The court charged the jury and upon the completion of the judge's charge, the petitioner excepted to the court's refusal to charge that assumption of risk is no defense to the negligence of the respondent or the unseaworthiness of the respondent's vessel. (R., 20).

VIII.
Argument

A seaman is entitled to an instruction that assumption of the risk is no defense to the shipowner's negligence or the unseaworthiness of the vessel when the shipowner relies heavily on the seaman's prior knowledge of the risk to which he exposed himself. The FELA, 45 U.S.C.A. 54, states "In any action brought against any common carrier .... such employee shall not be held to have assumed the risk of his employment." 45 U.S.C.A. 54 is incorporated in 46 U.S.C.A. 688, commonly known as the Jones Act, which states ".... and in such action all statutes of the United States .... conferring or regulating the right of action for death in the case of railway employees shall be applicable...."

This court clearly asserted in an FELA action or in other actions to which the FELA has been extended .... "its obligation to effectuate the present congressional intention .... granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500, 509. In *Schlemmer* v. *Buffalo, Rochester, and Pittsburg Ry.*, 205 U.S. 1, Mr. Justice Holmes cautioned that unless "great care" was taken to define assumption of risk and contributory negligence "the servants rights will be sacrificed by simply charging him with assumption of the risk under another name".

Prior to the 1939 amendment to the FELA, 53 Stat. 1404, 45 U.S.C.A. 54, a shipowner could bar a seaman's action by successfully asserting the defense of assumption of the risk. Following the amendment, this court in *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54 (1943), left little doubt about abolishing the defense of assumption of the risk when it said:

> "We hold that *every vestige* of the doctrine of assumption of the risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing the name to 'non-negligence' . . . . *'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name,' and no such result can be permitted here.''* (Italics supplied).

The retention of the doctrine of comparative negligence and the abrogation of the defense of assumption of risk after 1939 make it essential that a careful distinction between the two concepts be made. If the seaman's conduct in relation to his injury be characterized as contributory negligence, the shipowner would have a partial defense as to damages. On the other hand, if the seaman's conduct constituted assumption of risk, his right to recover against the shipowner would in no way be barred. This court further said in *Tiller* v. *Atlantic Coast Line R. Co., supra:*

> "The language of the statute itself seemed to impel the courts to practice 'the niceties if not casuistries, of distinguishing between assumption of the risk and contributory negligence, conceptions which never

originated in early distinguishing catagories but were loosely interchangeable until the statute attached such vital difference to them'."

Unless the trial judge instructs the jury on the issue of assumption of risk and contributory negligence and *distinguishes* one from the other, the jury cannot view the seaman's conduct in the proper light. If this distinction is not made it is probable and logical that a jury, where a judge's charge makes no reference to assumption of risk, may conclude that the seaman's exposure to a known risk constituted negligence on his part. In the case at bar, where the court's charge makes no mention of the doctrine of assumption of risk and makes no distinction between the doctrine of assumption of risk and contributory negligence, the jury could well have concluded that the petitioner's behavior in continuing to expose himself to the known danger constituted such a total disregard for his own safety so as to bar his recovery either by viewing the petitioner's conduct as one hundred percent contributory negligence or by applying the doctrine of assumption of risk under another name, "non-negligence".

The refusal of the petitioner's request by the trial court was in complete contravention of his Federal right guaranteed to him by the FELA. The decision of the Supreme Judicial Court of Massachusetts is in direct conflict with the holding of the Third Circuit in *Koshorek* v. *Pennsylvania R.R. Co.*, 318 F.2d 364 (3 Cir. 1962). In fact, the court below in its opinion acknowledges this conflict when it states, "Compare *Koshorek* v. *Pennsylvania R.R. Co.*, 318 F.2d 364, 366-370. (See the dissenting opinion pp. 371-375)".

In *Koshorek* v. *Pennsylvania R.R., supra,* the plaintiff, a railroad employee, brought suit under the FELA for dam-

ages resulting from a condition diagnosed as pulmonary emphysema and fibrosis. At the time of trial, plaintiff admitted he had been aware of dust just as the petitioner in the case at bar admitted that although he knew the ladder was defective, that the lighting was inadequate and that there were no handholds, he proceeded down the ladder. In *Koshorek,* the plaintiff requested that the jury be instructed that he did not assume the risk of his employment and the court refused but did charge on the issue of contributory negligence. The circuit court held that the trial judge should have charged that assumption of the risk is no defense and said:

> "The retention of the doctrine of comparative negligence and the abrogation of the defense of assumption of the risk necessitates that a careful distinction between the two concepts be made in a case such as that at bar arising under the Act. . . . In *Prosser,* Torts Section 55 (1955), 304-305, it is stated: '. . . . Where the two defenses overlap, there is a great deal of confusion of the two. Ordinarily it makes little difference which the defense is called. The distinction may become important, however, under such statutes as the Federal Employers' Liability Act which has now abrogated the defense of assumption of the risk entirely, but has left, contributory negligence as a partial defense reducing the amount of recovery. . . . The two may co-exist, or either may exist without the other. . . .'
>
> "He should have done so for the distinction between the two kinds of conduct is often very difficult even for a court to make and a jury of laymen scarcely can be expected to do so successfully. . . . Had an adequate distinction between conduct constituting contributory negligence and that which would have constituted assumption of the risk been pointed out to

> the jurors in the charge, the jury might well have reached a different verdict. In our opinion, the failure to charge properly as to the distinction constituted reversible error under the circumstances."

The decision of the Second Circuit in the case of *Clark* v. *Pennsylvania Railroad Company*, 328 F.2d 91 (2 Cir. 1964) is in direct conflict with the holding in the Third Circuit in the *Koshorek* case, *supra.*, and is also in direct conflict with the holding of *DeLima* v. *Trinidad Corp.*, 302 F.2d 585 (2 Cir. 1962), an earlier opinion in the same circuit. It is the petitioner's position that a conflict exists in the Second Circuit in spite of the court's discussion of the *DeLima* case in the *Clark* case.

In the *Clark* case, *supra*, the trial judge was requested to charge on assumption of the risk. The facts revealed that the plaintiff proceeded down the stairway although he knew there was no handrail and the stairway was in total darkness. The court refused the instruction and said:

> "Thus the instruction was properly refused as the rule is that a failure to grant a request for instructions that are in any respect incorrect and unsound does not constitute error....
>
> On the merits, however, there was no occasion for the giving of any instruction whatever on the subject of assumption of risk. . . . As the verdict was for the Railroad, it is extremely improbable that the jury ever reached the only issue to which assumption of the risk would have any relevancy".

The court then proceeded to discuss the *DeLima* case which it had decided prior to the *Clark* case. The court stated:

> "In emphasizing the rule that the liability of the shipowner for unseaworthiness is absolute and not dependent on fault, it held that the particular circumstances of that case made it necessary to give the requested instruction on assumption of risk 'to avoid confusion in the jury's mind.' Without such a complementary instruction the jury might have thought the duty to provide a seaworthy vessel was less than absolute."

It is the petitioner's position that no significant distinction was made and since the *Clark* case did not overrule the *DeLima* case, the cases conflict. This is evidenced by reviewing the opinion of the same court approximately two years prior to the *Clark* case. In *DeLima*, a seaman slipped and fell on an accumulation of oil on the engine room floor. The court said at that time:

> "The trial judge also refused, upon request, to charge the jury that the doctrine of assumption of risk was not applicable to plaintiff. The denial was based on the grounds that the doctrine had not been pleaded by defendant and was not an issue in the case. We believe, however, that such an instruction would have been proper to avoid confusion in the jury's mind."

The Fifth Circuit in *Texas and Pacific Railway Co.* v. *Buckler*, 232 F.2d 257, (5 Cir. 1956), held it is not necessary to charge on assumption of the risk and relied upon the concurring opinion of Mr. Justice Frankfurter in *Tiller* v. *Atlantic Coast Line R. Co., supra.*:

> "Because of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool. As a means of instruct-

ing a jury, it is bound to create confusion. It should therefore be discarded."

Also, see *Pyles* v. *American Trading and Production Corporation*, 372 F.2d 611 (5 Cir. 1967), where the Court of Appeals for the Fifth Circuit said the trial court was correct in refusing to instruct on assumption of the risk.

The Sixth Circuit in *Dilley* v. *Chesapeake & Ohio Ry. Co.*, 327 F.2d 249, (6 Cir. 1964) followed the reasoning set forth in *Koshorek* and is consistent with the Third Circuit. The court also quoted Mr. Justice Frankfurter but interpreted the same words in a different manner:

> "In view of these expressions where it is necessary to distinguish between assumption of the risk and contributory negligence the instructions should carefully and fully make the distinction."

There is still further conflict and confusion for other State appellate courts have held that whether the trial court charges on assumption of the risk when the issue is raised by either the pleadings or the evidence is solely within the discretion of the trial court. *Graham* v. *Toledo, Peoria & Western R.R. Co.*, 35 Ill. App. 2d 234, 182 N.E. 2d 889, *Reid* v. *Terminal R.R. Ass'n. of St. Louis*, 306 S.W. 2d 630 (Mo. App. 1957), *Clary* v. *Southern Pac. Co.*, 189 Cal. App. 2d 89, 11 Cal. Rptr. 193 (1st Div. 1961).

It is apparent from the aforementioned cases that there are numerous contradictory decisions concerning the defense of assumption of risk. As a result of these decisions, three separate and distinct principles of law have developed when instructing the jury in the doctrine of assumption of risk. Some appellate courts state as a matter of law that a seaman is entitled to a request on assumption of risk once the court charges on contributory negligence

or the issue of assumption of risk is raised by either the pleading or the evidence. Other appellate courts state that as a matter of law a seaman is not entitled to a request even if raised because it will only tend to confuse the jury. Still other appellate courts have said that it is discretionary with the trial judge to charge once the issue is raised. As a result of these conflicting decisions a great deal of confusion has resulted and in many instances, as in the case at bar, a seaman is still being charged with assumption of the risk even though it has been barred by statute.

The evidence introduced during this trial by the respondent raised the issue of assumption of risk when petitioner stated that although he knew of the dangerous condition he exposed himself to it. Therefore, the jury could have believed that the petitioner was responsible for his own injuries by viewing the petitioner's conduct as one hundred per cent contributory negligence instead of assumption of risk, or by applying the defense of assumption of the risk by changing its name to "non-negligence". If the court below had made the proper and necessary distinction between assumption of the risk and contributory negligence as requested, the jury could well have considered the petitioner's and defendant's conduct in the proper light.

IX.
Conclusion

There is little difference between not charging on assumption of risk when the issue is raised and granting to the shipowner the defense of assumption of risk.

WHEREFORE, the petitioner respectfully submits that the court below interpreted 45 U.S.C.A. 54 so as to restrict its meaning and rights created thereunder contrary to the standards of law as laid down by clear pronouncements in the decisions of this Honorable Court and that certiorari

should be granted to bring to a termination the conflict between the circuits and to prevent a grave injustice.

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Appendix A.

DOCKET ENTRY OF JUDGMENT

March 27, 1967

Judgment for plaintiff, $340.57 damage, $27.70 costs

Appendix B.

RESCRIPT

Commonwealth of Massachusetts
Supreme Judicial Court for the Commonwealth
at Boston, March 13, 1967

In the case of

MICHAEL J. VAIARELLA
v.
JAMES F. SHANAHAN CORPORATION
pending in the Superior Court for the County of Essex
Ordered, that the following entry be made in docket; viz.,

EXCEPTIONS OVERRULED.

By the Court
RICHARD A. MCLAUGHLIN, *Clerk*

March 13, 1967.

Appendix C.

OPINION OF THE COURT

E-13,698

Michael J. Vaiarella v. *James F. Shanahan Corporation.*

WHITTEMORE, J. The plaintiff, a seaman and fisherman, in count 1 of his declaration against the defendant shipowner, alleged negligence and sought recovery under the Jones Act (46 U. S. C. § 688 [1952]). In count 2, he sought recovery regardless of negligence under general maritime law, alleging that the vessel was unseaworthy. The jury found for the defendant under both counts and the plaintiff brings before us his exceptions to the judge's charge.

There was evidence from which the jury could have found as follows: The accident occurred at about 8 P.M., April 28, 1963, on the high seas when the plaintiff slipped on a worn step of the companionway ladder leading from the doghouse down to the forecastle. The condition had existed for at least two months prior to the accident and the plaintiff had told the captain about it. The doghouse and companionway were not lighted but there was light from the forecastle at the bottom of the companionway. There were no handholds leading from the doghouse going below; the custom and practice at the time of the accident was to provide handholds in such an area. The plaintiff and other members of the crew had used the ladder many times a day for the prior two months and the plaintiff, when he started down the ladder, knew the companionway was unlighted.

The case was first tried in the District Court of Eastern Essex. The finding of the district judge for the defendant on count 1 and count 2 was in evidence under appropriate instructions.

1. The plaintiff asserts that it was error to decline to charge in respect to count 1 (request No. 3) that if "the

jury finds that the defendant's negligence played any part, even the slightest, in producing the injuries, then the jury should find for the plaintiff."

The request reflects the test of whether a case must be submitted to the jury as stated in *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 ("whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury"). See also *Webb* v. *Illinois Cent. R.R.*, 352 U.S. 512, 515-516; *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523-524; *Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108, 113-117; *Davis* v. *Baltimore & Ohio R.R.*, 379 U.S. 671.

The plaintiff relies on *DeLima* v. *Trinidad Corp.*, 302 F.2d 585, 587-588 (2d Cir.), where the judge below gave a traditional definition of proximate cause and declined to give an instruction like that before us, except that the concluding words were "the plaintiff may recover." The Court of Appeals said, "Since the language of the requested charge was taken directly from . . . [the *Rogers* case] a decision which reflects the Supreme Court's view that the Federal Employers' Liability Act . . . and the Jones Act are departures from traditional common law principles, we believe the requested charge should have been given."

We are disinclined to establish a special rule for instructions in one class of negligence actions. See *Kane* v. *Fields Corner Grille, Inc.*, 341 Mass. 640, 642-643 (the better practice is not to refer to "highest degree of care" in public carrier cases). The opinions of the Supreme Court of the United States which, as noted, require submission of the issues to the jury if there is the slightest evidence of causal relationship, do not suggest to us that special or unusual instructions should be given to the jury. In the *Gallick* case (372 U.S. 108 at 118), in dis-

cussing whether the evidence permitted the conclusion of foreseeability, the court noted and quoted the instructions as to negligence and foreseeability given, as in the case before us, in accordance with long established rules.

The charge in the case at bar was appropriate and clear. Using the language of the Jones Act, the judge said that one of the three elements at issue was whether the plaintiff had sustained an injury which was due "in whole or [in] part" to the negligence of the shipowner.[1] After defining negligence and the defendant's duty in the circumstances, he concluded this part of the charge: "If after having made all these determinations you determine that the plaintiff has satisfied you by a fair preponderance of the evidence that the defendant failed to supply a reasonably safe ship to him, and he was negligent in doing it because he either knew of it or should have known of it, then of course the plaintiff is entitled to recover. If he hasn't satisfied you by a fair preponderance on those essential elements, then of course he is not entitled to recover."

The evidence suggested no substantial issue as to the place of the plaintiff's fall. There appeared, therefore, no need for the judge to dwell on the law relative to the causal link between negligence and accident. We rule that it was not error to decline to give request No. 3.

---

[1] "[Y]ou will recall that I said to you a moment ago the burden of proof is on the plaintiff to satisfy you by a fair preponderance of the evidence on all the essential elements. Well, of course, the essential elements in count one is proof by a fair preponderance that he was a fisherman in the course of his employment. . . . [O]n the factual situation as we have it here there doesn't seem to be much question about that element of count one. And, of course, the second element to be considered is whether or not he sustained an injury which was due in whole or [in] part by [*sic*] the negligence of the ship owner. And the third element . . . is whether or not the injuries complained of and the damages alleged were causally related to the accident that came about as a result of the negligence on the part of the ship owner."

2. The plaintiff excepted also to the judge's failure to rule that "Assumption of the risk is no defense to the negligence of the defendant or the unseaworthiness of the defendant's vessel . . ."

There was no occasion to give this request. The shipowner's duty under each count in respect of supplying a safe ship was duly stated. There was no reason for the judge or the parties to believe that any thought related to this old doctrine, largely a creature of judicial construction, would enter any juryman's mind. The plaintiff suggests that the jury, from the evidence that he had used the companionway for two months, might have concluded that his contributory negligence was sufficient to bar any recovery. This appears most unlikely; the obvious relevance was only that he was well acquainted with its condition and the need of care. The judge duly instructed that contributory negligence would mitigate damages, but not bar recovery. And the judge expressly stated that the plaintiff as a seaman had to serve the vessel and had to work under conditions beyond his control. Although this was in the discussion of unseaworthiness, it was a direct statement of relevance to the whole action of the status of the seaman on the ship. We think it tenuous to suggest that the jury, knowing that the seaman had no choice but to take the ship as he found it, could, contrary, in effect, to the instructions given, find that he was negligent and barred from recovery because he voluntarily entered employment on a ship that turned out to have a defective companionway. See *Clark* v. *Pennsylvania R.R.*, 328 F.2d 591, 595-596 (2d Cir.), distinguishing *DeLima* v. *Trinidad Corp.*, 302 F.2d 585, 587 (2d Cir.). In the latter case the court in the special circumstances has said that reference to assumption of risk would have been proper. Compare *Koshorek* v. *Pennsylvania R.R.*, 318 F.2d 364, 366-370. See the dissenting opinion (pp. 371-375).

3. There was no error in declining to give in precise terms requests 7 and 8 (applicable to count 2). "Unseaworthiness is a species of strict liability regardless of fault. It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists. Lack of notice or knowledge on the part of the defendant of the unseaworthy condition is no defense . . . liability for unseaworthiness being absolute and completely divorced from concepts of negligence."

The law embodied in these requests was adequately stated. The judge charged that under count 2 the plaintiff is "not compelled . . . to prove negligence on the part of the defendant. This is a right that exists under our maritime laws, and it does not rest upon any theory of negligence. The plaintiff is entitled to recover on this count if he proves to you by a fair weight of the credible evidence that the vessel was unseaworthy and that the unseaworthiness contributed in whole or in part to his injuries. . . . [B]y reason of this relationship . . . the crewman has to serve the vessel. He must obey orders . . . and work under conditions that are beyond his control. This establishes an absolute duty on the part of the owner to supply to him a ship that is seaworthy. . . . [I]f it is unseaworthy it does not have the equipment, the gear, and the appliances and the tools reasonably fit and adequate to perform the job at hand. . . . [That] a vessel is seaworthy . . . means more than the vessel is sound for the purpose of sailing on the high seas. If a vessel or any of its equipment are not reasonably fit for a seaman to perform his work, then the ship is unseaworthy." The judge appropriately charged also with a quotation from *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 550, that though "[t]he duty is absolute . . . it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use."

Exceptions overruled.

Appendix D.

FEDERAL EMPLOYERS' LIABILITY ACT

45 U.S.C.A. 54 Assumption of Risks of Employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Apr. 22, 1908, c. 149 § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

Appendix E.

MERCHANT MARINE ACT OF 1920
(JONES ACT)

46 U.S.C.A. 688

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

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Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 190.

MICHAEL J. VAIARELLA,
Petitioner,

v.

JAMES F. SHANAHAN CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MASSACHUSETTS, ESSEX COUNTY.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Supreme Court of the United States.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Question Presented by Petitioner.

The petitioner presents, on pages 2 and 3 of his brief, a single question, to wit: Must a trial judge charge a jury that "assumption of the risk is no defense to the negligence of the defendant or the unseaworthiness of the defendant's vessel"?

In answer thereto, the defendant says that in his opinion there is no need for the trial judge to charge the jury in precisely the words requested if the judge duly states the defendant's duty under the negligence and unseaworthiness counts; in particular, if the judge charges the jury in such a manner as to indicate the absolute responsibility of the defendant and if the defendant has not pleaded "assumption of the risk" as an affirmative defense and has not brought up during the course of the trial defense of as-

sumption of the risk, then the trial judge need not charge the jury as requested.

Counter-Statement of the Facts.

Also, the main petitioner's statement of the facts is accurate except that there was no testimony that the lighting was "inadequate" as stated by the petitioner, nor was there testimony that the plaintiff "knew that the ladder was defective."

Argument.

During the trial judge's charge to the jury there was adequate coverage by which the jury could determine that the duty of the defendant to provide a seaworthy vessel was absolute. Further, the trial judge's charge explained fully the defendant-shipowner's duty in respect to supplying a safe ship.

In all respects the judge explained the positive obligations of the defendant-shipowner from which the jury could have determined the defendant's responsibilities.

Further, the trial judge explained in some detail the effect of the actions of the defendant so that there would be a mitigation of damages in the event the plaintiff recovered anything.

Plaintiff now contends that the explanation of the effect of the plaintiff's actions to mitigate damages should have contained the words "assumption of the risk" and the plaintiff now contends that, inasmuch as the trial judge's explanation did not contain these words, then the jury was probably mistaken as to the effect of the knowledge of the condition of the ship on the seaman's right to recovery.

In this aspect defendant relies on the opinion of the Massachusetts Supreme Judicial Court which is part of

the record of the petition submitted by the petitioner, which says, "we think it is tenuous to suggest that the jury, knowing that the seaman had no choice but to take the ship as he found it, could, contrary, in effect, to the instructions given, find that he was negligent and barred from recovery on a ship that turned out to have a defective companionway."

In *Clark* v. *Pennsylvania Railroad Co.*, 328 F. 2d 591, 591-596 (2d Cir.), the Court said substantially the same thing.

However, in *DeLima* v. *Trinidad Corp.*, 302 F. 2d 585, 587 (2d Cir.), the Court did say that reference to assumption of the risk would have been proper. But, in that case, the circumstances suggested that, unless the reference to assumption of the risk was made, the jury "might have thought the duty to provide a seaworthy vessel was less than absolute." This was merely to clarify the positive obligation of the shipowner to provide a seaworthy or safe ship, and not to elaborate on the owner's defenses.

The defendant respectfully submits that, wherever a Court of Appeals has suggested that the trial Court of that particular circuit should have made reference to "assumption of the risk," the reason was that there should have been a clarification of the obligations of the defendant and not merely to add into the record an affirmative defense which adds nothing by way of explanation, but merely redefines a plaintiff's right to recover even though he might have known of the existence of a defective condition in a ship.

There was no reason to give the charge as requested—the defense was not pleaded nor argued, and the obligations of the shipowner and the rights of the plaintiff were amply stated. There could be no confusion in the jury's mind as to these facts.

Conclusion.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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